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October 15, 1993

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OCT 15 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 93-240

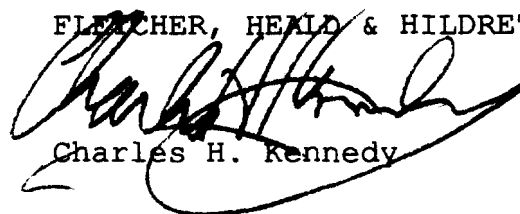
Dear Mr. Caton:

Enclosed for filing on behalf of The Bell Atlantic Telephone Companies are an original and four (4) copies of its Comments in the above-referenced matter.

If you have any questions, please do not hesitate to write or call.

Respectfully submitted,

FLETCHER, HEALD & HILDRETH


Charles H. Kennedy

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Enclosure

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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OCT 15 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Accounting for Judgments and) CC Docket No. 93-240
Other Costs Associated with)
Litigation)

**COMMENTS OF THE BELL
ATLANTIC TELEPHONE COMPANIES¹**

The Commission's proposal to book certain litigation costs in below-the-line accounts originated in response to the unequalled level of antitrust activity that preceded the divestiture of the Bell System, and was formulated at a time when all communications carriers were regulated on a rate-of-return basis. Times have changed, and the Commission should reconsider the need for these rules in light of present-day realities, particularly for price cap local exchange carriers.

Price cap regulation discourages imprudent and wasteful management decisions by ensuring that they harm shareholders rather than ratepayers. The incentives for efficiency are designed to eliminate the need for Commission scrutiny of individual management decisions and the resulting revenue requirements.

The proposed rules, on the other hand, will result in a separate proceeding each time an antitrust action against a carrier

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are the four Chesapeake and Potomac Telephone Companies, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania and The Diamond State Telephone Company.

is resolved by settlement or judgment. In that proceeding, the carrier will have the burden of rebutting the presumption that the underlying conduct was not undertaken for the benefit of ratepayers, whether or not the conduct was admitted or proved.

This potential proliferation of protracted proceedings is unnecessary where carriers are regulated under price caps, and is inconsistent with the concept of price cap regulation. As the Commission acknowledges, the only possible harm to ratepayers from litigation costs, in a price cap environment, occurs where those costs reduce the earnings available for sharing or hold a carrier's earnings below the point at which sharing otherwise would be required.² In all other situations, the allowance or disallowance of litigation expenses will have no effect on rates. In addition, the burden placed on carriers to prove ratepayer benefit almost guarantees that each proceeding will be lengthy and will consume considerable Commission and carrier resources.³

If the Commission nonetheless adopts its proposal to treat antitrust litigation costs as presumptively below-the-line, Bell Atlantic urges that litigation expenses should be booked as they are incurred rather than held in a balance sheet deferral account, and that all costs associated with non-antitrust litigation should

² Notice of Proposed Rulemaking and Order (hereinafter "NPRM") at para. 7.

³ The Commission can deal with antitrust litigation costs incurred by price cap carriers on an ad hoc basis, by scrutinizing those costs only where they have the effect of keeping the carrier's earnings out of the sharing range, or where they reduce the earnings available for sharing.

continue to be booked above the line.

The Commission's proposal to collect antitrust litigation expenses in a balance sheet deferral account until the litigation is resolved is contrary to generally accepted accounting principles ("GAAP") and unfair to price cap carriers such as Bell Atlantic.⁴ If costs are collected in a deferral account, they will not be reflected in Bell Atlantic's earnings for sharing purposes. Bell Atlantic might be charged with overearnings during the period in which those costs are deferred, and would have to share those supposed overearnings with ratepayers even though the outcome of the litigation may be favorable to Bell Atlantic and the Commission later may allow the expenses.⁵

A better solution is to permit carriers to record antitrust litigation expenses above the line pending the outcome of the litigation. If the resolution of the case is adverse to the carrier, the Commission then can order those costs to be expensed below the line currently if the carrier cannot demonstrate that the conduct leading to the litigation was undertaken for the benefit of

⁴ Under GAAP, expenses associated with litigation should be accrued as they are incurred and should be included in the determination of net income for the current period -- not deferred for inclusion in net income in some future period. See, e.g., FASB Statement of Financial Accounting Standards No. 5 ("Accounting for Contingencies") and FASB Statement of Concepts No. 5 ("Recognition and Measurement in Financial Statements of Business Enterprises").

⁵ The Commission's proposal to amortize these expenses above the line "for a reasonable period" (NPRM at para. 17) when a case is resolved in favor of the carrier also invites additional regulatory involvement and delay, since the Commission will have to determine a reasonable amortization schedule in each such case.

ratepayers.⁶

The Commission's rules also should recognize that a carrier may be an antitrust plaintiff, rather than a defendant. It makes no sense to defer above-the-line recording of expenses in cases in which the carrier is not accused of violating the antitrust laws, but is alleging injury caused by the actions of others.

The Commission also asks whether the costs of litigation arising under federal statutes other than the antitrust laws should be presumptively disallowed. Bell Atlantic urges that no other federal statutes should trigger this presumption. By the Commission's own reasoning, antitrust violations are unique because the antitrust laws are intended to protect consumers, so that conduct violative of the antitrust laws is unlikely to have been undertaken for the benefit of ratepayers.⁷ This analysis does not extend to other federal statutes such as the tax laws, the securities laws and the environmental laws. As the Court of Appeals' Litigation Costs Decision suggests, conduct found to be violative of non-antitrust statutes may very well benefit ratepayers by reducing the carrier's revenue requirement (in a

⁶ Giving any disallowance prospective effect should eliminate concerns about retroactive ratemaking.

⁷ "Very compelling evidence would . . . be required to justify a conclusion that ratepayers benefited from violations of statutes that are designed, in substantial part, to protect consumers." Notice of Proposed Rulemaking to Amend Part 31 Uniform System of Accounts for Class A and Class B Telephone Carriers to Account for Judgments and Other Costs Associated with Antitrust Lawsuits, and Conforming Amendments to the Annual Report Form M, 2 FCC Rcd 3241, 3244 (Report and Order released May 15, 1987); see also *Mountain States Tel. & Tel. Co. v. F.C.C.*, 939 F.2d 1035, 1043 (D.C. Cir. 1991).

rate-of-return environment) or increasing the funds available for sharing with customers of a price-cap carrier.⁸

Respectfully submitted,

THE BELL ATLANTIC TELEPHONE
COMPANIES

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Of Counsel

Date: October 15, 1993

⁸ Mountain States Tel. & Tel. Co. v. F.C.C., supra, 939 F.2d at 1044-45.

CERTIFICATE OF SERVICE

I, Rebecca Ingham, certify that an original and four copies of the attached Comments of the Bell Atlantic Telephone Companies ("Comments") were filed with the Secretary of the Federal Communications Commission on October 15, 1993. A copy of these Comments also was hand delivered on this same date to:

ITS, Inc. (Downtown Copy Center)
1990 M Street, N.W.
Suite 640
Washington, D.C., 20036

A copy of these Comments was mailed on this same date, first class, postage prepaid to:

Accounting and Audits Division
Common Carrier Bureau
Federal Communications Commission
2000 L Street, N.W., Room 257
Washington, D.C. 20554


Rebecca Ingham